

Information

For the Laird of INNES, Against The Duke of Gordon.

THE Laird of *Innes* having Right to a Wodset granted to his Grandfather, by the Marquess of *Argile*, of the Lands of *Enzie*, for the Summ of Twenty Thousand Pound *Scots*, which *Innes* had payed as Cautioner for the Marquess of *Huntlie*, pursues the Tenents of the Wodset Lands, for Maills and Duties, and calls the Duke of *Gordon* as an Intrömetter. This Action being called before the Lord *Crosrig*, Compearance is made for the Duke of *Gordon*.

And it was alledged, 1. No Process upon the Contract of Wodset produced; Because only signed by the Marquess of *Argile*, and not by the Laird of *Innes* the other Party.

To which it was Answered for the Pursuer, 1. That this was altogether *justitii* to the Duke, who produced no Right in his person, and was only called as an Intrömetter: So that the Pursuer's bare Seasin was Title enough against him, unless he should propone upon a better Right. 2. *Innes*'s part of the Contract is fully performed, and the Marquess or any representing him, hath nothing to demand, and the Duke represents him not, nor is at all concerned in this Question.

2. It was alledged for the Duke of *Gordon*, No Process; Because the Pursuer's Seasin proceeds upon a Retour, Retouring the Lands to be holden of the King: Whereas by the Wodset produced, they held of the Marquess.

To which it was Answered, 1. That since the Duke produces no Right, nor offers to produce any; The Seasin and Retour are a sufficient Title against him, as against all Tenents Intrömetters. 2. The Retour is a standing Retour, and can neither be objected against by the Duke, nor taken away in this manner. But 3. The Retour is Just and True, for it bears, That the Lands did hold of the King, by Reason of the Marquess his Forefeiture, and the Pursuer was not bound to know any Donator.

But as to both the Dilators, they are noways pertinent, to be proponed by the Duke of *Gordon*, or any other bare Intrömetter; Unless the Duke do first propne upon a better Right, which the Pursuer is content of, Reserving to him to object *com. producenda*: And therefore, the Lord Ordinary did justly repell both the Dilators, and did only give the Lords answer through the importunity of the Duke's Procurators. And the Lords will no doubt repel them in the same manner, unless the Duke first propone, and offer to produce a better Right.

And whereas it was further pretended for the Duke, That 1. The Onerous Cause of the Wodset upon *Innes*'s part, being his Assignment of the Summs therein contained, in favours of the Marquess; The Assignment was Null for want of *Innes*'s Subscription. 2. That it is competent to the Duke to obtrude the said Nullity; Because he stands infest in the Lands lybelled, though as a singular Successor. 3. That the Contract of Wodset being Null, as said is; The Seasin and all that followed thereon, falls in consequence. 4. That the Retour asbearing the Lands retourred holden of the King, by reason of *Argile*'s Forefeiture, is intrinically Null, without necessity of intending Reduction thereof. 5. That Duke *Gordon* being infest in the Lands lybelled, by singular Titles *is notorium*: So that he needs not produce his Interest, nor take a day for verifying the same.

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Answered, That the Duke's Procurators take the freedom to banter a serious Matter too much. For 1. As it is known to have been the Custome in Cases of mutual Obligements by Contract, That each Partie subscribing, should deliver his Copy so subscribed to the other, and thereupon receive the other Partie's subscribed Double; So have Decisions sustained the Interest of the Person Use-maker of the Contract so subscribed by the Adverse-party, because so using it, evidences his Consent, and he binds himself to all the Conditions thereof, as effectually as if he subscribed the same. And the Reason of all this is, That Use-making is an Homologation, and Homologations do bind Irreversibly. And *ita est*, and *esto*, any representing the Marquees of *Argile* (whose Interest alone it is to quarrel the want of *Innes* his Subscription) were impugning the Contract upon that head, he would certainly be repelled, because he could oblige *Innes* to fulfil the whole Heads of the Contract, specially since *Innes* now makes use of it, and he and his Predecessors stand infest by vertue of the Precept therein contained. *Ergo*, The Duke's Insinuation of the Contracts being null for want of *Innes* his Subscription, ought *multo magis* to be repelled, as frivolous. Besides that, 2. The Objection is altogether *jus tertii* to the Duke, and so much the more that he alledges upon nothing but a singular Title to the Lands lybelled, which gives him no Interest to quarrel the Wodset Right by way of Disposition, clearly conceived in *Innes* his Favours, by the Contract under *Argile's* Hand, and Subscription *per expressum*. And 3. As *Argile* himself the Subscriber, were he impugning the said Wodset Right so subscribed by him, on the pretext of *Innes* his not being bound by the Contract, would be repelled by reason of the inevitable binding Arguments aforesaid upon *Innes*, so as the Contract or Wodset Right could not on such a Pretext be resiled from by *Argile*, so much less can the Duke of *Gordon*, who is altogether dis-interested as said is, be heard to obtrude the want of *Innes* his Subscription, or there-through to alledge the Nullity of the Contract, with all that followed thereon. 4. It is a mistake to say that the retouring of the Lands as holding of the King, throw *Argile's* Forefeiture, renders the Retour intrinsically Null. Intrinsick Nullities of Rights or Infestments by the *Act 42. Parl. 6. Q. M.* being such as are Nullities of the Law, and by our Practice must be instantly verified. And *ita est*, That the Duke's Procurators, if they think more deliberately, will not say that the retouring of Lands to be holden of the King in any Case *per se*, renders the Retour *ipso jure* Null of the Law, specially where there is no other defect alledged upon, and instantly verified. And 5. The Duke's Procurators do but jeast in alledging upon the Notoriety of the Duke's possessing by vertue of Titles from the King, or otherways (that will exclude the Pursuer's Retour and Seisin thereon, by precept out of the King's Chancery) as sufficient to repel the Pursuer's Process, without necessity of producing the Duke his said Rights; Because, whatever the Duke's Rights may be *non constat*, but if they were once produced, they may be found so defective, as not to be sufficient Titles of Possession. And therefore it is, that the Notoriety of any Man's Possession by an alledged Title, is never sustained, without the Title so alledged upon be produced, that the Adverse-party may have occasion to object what he has to say against the same.

In respect of all which, the Duke's Alledgeances ought to be repelled, and he should be decerned in the Maills and Duties lybelled, unless he take a Term to produce the alledged preferable Title and Rights founded upon by him, as 1th inviolable form of procedure, is usual in all such Cases.